

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

MIGUEL PULIDO ROMERO,	)	No. CV-F-05-1016 REC
	)	(No. CR-F-03-5373 OWW)
	)	
Petitioner,	)	ORDER DIRECTING PETITIONER
	)	TO NOTIFY COURT THAT MOTION
vs.	)	BE RECHARACTERIZED AS MOTION
	)	PURSUANT TO 28 U.S.C. § 2255
	)	OR TO WITHDRAW MOTION
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	
	)	
	)	

On August 5, 2005, petitioner Miguel Pulido Romero, proceeding in pro per, filed a "Motion to Dismiss or Review to Adjust Sentence, For Lack of Territorial Jurisdiction."

Petitioner was charged in Count One with conspiracy to distribute and possess with intent to distribute methamphetamine and aiding and abetting, and in Count Two with possession of methamphetamine with intent to distribute and aiding and abetting. Petitioner pleaded guilty to Count One pursuant to a written plea agreement. The plea agreement provided in pertinent part:

1           2.   Agreements by the Defendant.

2           ...

3                   (d) The defendant is aware that  
4           Title 18, United States Code, Section 3742  
5           affords a defendant the right to appeal the  
6           sentence imposed. Acknowledging this, the  
7           defendant knowingly waives the right to  
8           appeal his conviction or any sentence which  
9           is in accordance with the maximum provided in  
10          the statute(s) of conviction (or the manner  
11          in which that sentence was determined) on the  
12          grounds set forth in Title 18, United States  
13          Code, Section 3742 or on any other ground  
14          whatever, in exchange for the concessions  
15          made by the United States in this plea  
16          agreement. The defendant also waives his  
17          right to challenge his conviction, sentence  
18          or the manner in which it was determined in  
19          any post-conviction attack, including but not  
20          limited to a motion brought under Title 28,  
21          United States Code, Sections 2241 or 2255.

22          ...

23          5.   Factual Basis.

24          The defendant will plead guilty because he is  
25          in fact guilty of the crime set forth in the  
26          Superseding Information, Cr.F.No. 03-5373  
27          REC. The defendant also agrees that his  
28          guilty plea will be based upon the following  
29          facts, although he acknowledges that, as to  
30          other facts, the parties may disagree:

31                   Beginning at a time unknown, but no  
32          later than on or about September 21, 2003,  
33          and continuing to on or about September 22,  
34          2003, within the State and Eastern District  
35          of California, and elsewhere, defendant  
36          Miguel Pulido Romero did knowingly and  
37          intentionally agree and conspire with Sergio  
38          Martinez Galindo, Arturo Reyes Gutierrez and  
39          others to possess and distribute over 500  
40          grams or more or a mixture or substance  
41          containing a detectable amount of  
42          methamphetamine, a Schedule II controlled  
43          substance. Specifically, on September 22,  
44          2003, a DEA Confidential Source and DEA  
45          Special Agent Eduardo Chavez, acting in an

1       undercover capacity, met with Galindo,  
2       Gutierrez, and defendant Pulido Romero at a  
3       Denny's Restaurant parking lot in  
4       Bakersfield, California, for the purpose of  
5       consummating a narcotics transaction. Prior  
6       to this meeting, an informant had negotiated  
7       with Galindo for the purchase of six (6)  
8       pounds of crystal methamphetamine for  
9       \$24,000. Galindo had told informant that he  
10      was traveling with an individual named  
11      'Ricardo' (identified as Gutierrez) and  
12      another individual nicknamed 'Guero' (later  
13      identified as the defendant, Pulido Romero).

14       That afternoon, co-defendants  
15      Galindo and Gutierrez arrived at the Denny's  
16      parking lot in a blue station wagon. The  
17      informant and agent Chavez met with them.  
18      Defendant Pulido Romero walked over to meet  
19      the group. When the informant asked to see  
20      the merchandise, Galindo directed Gutierrez  
21      to bring the blue station wagon and park it  
22      near defendant Pulido Romero's green  
23      Thunderbird. Agent Chavez observed Pulido  
24      Romero reach into the driver's window, stop  
25      the engine, and open the trunk and hood of  
26      the Thunderbird. Gutierrez parked the  
27      station wagon near the Thunderbird while  
28      Galindo opened the hoods of both vehicles as  
29      if to give the impression that they were  
30      attempting to jump start the car.

31       Agent Chavez walked to the trunk of  
32      the car and asked Pulido Romero if the  
33      'stuff' was in the trunk. He said no and  
34      pointed towards the hood of the vehicle.  
35      Agent Chavez walked to the front of the Ford  
36      Thunderbird and observed Galindo opening the  
37      air filter portion of the engine. The agent  
38      then saw six off-white oval size objects  
39      wrapped in saran wrap, which chemical  
40      analysis showed contained approximately 2,420  
41      grams of methamphetamine.

42       Pulido Romero gave a false name  
43      when he was arrested. A fingerprint check  
44      revealed his true identity. At the time,  
45      defendant Pulido Romero knew that  
46      methamphetamine was a controlled substance.

47      Petitioner was sentenced by Judge Robert Coyle on May 17, 2004 to

1 120 months imprisonment, the mandatory minimum for the crime to  
2 which petitioner pleaded guilty.<sup>1</sup> No appeal was filed.

3 In the instant motion, petitioner "demands of this  
4 legislative tribunal assembly the dismissal of this cause because  
5 of the lack of exclusive jurisdictional authority over the exact  
6 geographical location where the alleged criminal activity  
7 mentioned in the indictment took place" and further demanding

8 of this court to establish the required  
9 exclusive Federal Jurisdiction that have been  
merely assumed in this matter, consisting of:

10 1. Documentation showing ownership of each  
11 and every geographical location mentioned in  
the instant indictment wherein the alleged  
12 criminal activity took place.

13 2. Documentation for legislature of the  
14 State of CALIFORNIA, surrendering  
jurisdiction to the Federal government over  
15 the same geographical location as in '1.  
[sic]

16 3. Documentation pursuant to Title 40 U.S.C.  
17 § 255, wherein the United States accepted  
jurisdiction to the same geographical  
18 location as specified in #1, or documentation  
showing concurrent jurisdiction with the  
19 states over the geographical location in #1  
....

20 Alternatively, the motion requests the court to reconsider the  
21 sentence imposed on him, contending that he is a young man, who  
22 has tried his best in prison, that this is his only crime, that  
23 he has a family to support which caused him to come to the United  
24 States for work, and that the court "now [has] the ability to

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25 <sup>1</sup>Further proceedings in the underlying criminal action were  
26 transferred to the docket of Judge Oliver Wanger by order filed on  
May 31, 2005.

1 have the 'sentence be given to fit the crime,' because of the new  
2 Supreme Court Rulings, in BOOKER and BLAKELY."

3 As a general rule, challenges to the legality of a federal  
4 conviction and sentence must be brought pursuant to 28 U.S.C. §  
5 2255 while challenges to the manner of execution of the sentence  
6 must be brought pursuant to 28 U.S.C. § 2241. United States v.  
7 Giddings, 740 F.2d 770, 772 (9<sup>th</sup> Cir. 1984).<sup>2</sup> Here, petitioner  
8 challenges the legality of his conviction and sentence.

9 In United States v. Seesing, 234 F.3d 456, 464 (9<sup>th</sup> Cir.  
10 2000), the Ninth Circuit holds:

11 When presented with a pro se motion that  
12 could be recharacterized as a 28 U.S.C. §  
13 2255 motion, a district court should not so  
14 recharacterize the motion unless: (a) the pro  
15 se prisoner, with knowledge of the potential  
16 adverse consequences of such a  
17 recharacterization, consents, or (b) the  
18 district court finds that because of the  
19 relief sought that the motion should be  
20 recharacterized as a 28 U.S.C. § 2255 motion  
21 and offers the pro se prisoner the  
22 opportunity, after informing the prisoner of  
23 the consequences of recharacterization, to  
24 withdraw the motion. Under either scenario,  
25 the pro se prisoner has the option to  
26 withdraw the motion and file one all-  
inclusive 28 U.S.C. § 2255 motion within the  
one-year statutory period.

21 Therefore, before recharacterizing the instant motion as a  
22 motion for relief pursuant to Section 2255, the court advises  
23 petitioner that such a motion Section 2255 has a one-year

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24 <sup>2</sup>Petitioner cannot obtain the relief sought by this motion  
25 pursuant to Rule 35, Federal Rules of Criminal Procedure, or  
26 pursuant to 18 U.S.C. § 3582(c) because he does not meet the  
criteria for reconsideration of an imposed sentence set forth  
therein.

1 limitation period. This limitation period runs from the latest  
2 of:

3 (1) the date on which the judgment of  
4 conviction becomes final;

5 (2) the date on which the impediment to  
6 making a motion created by governmental  
7 action in violation of the Constitution or  
8 laws of the United States is removed, if the  
9 movant was prevented from making a motion by  
10 such governmental action;

11 (3) the date on which the right asserted was  
12 initially recognized by the Supreme Court, if  
13 that right has been newly recognized by the  
14 Supreme Court and made retroactively  
15 applicable to cases on collateral review; or

16 (4) the date on which the facts supporting  
17 the claim or claims presented could have been  
18 discovered through the exercise of due  
19 diligence.

20 Because petitioner's conviction and sentence became final on May  
21 27, 2004, petitioner must demonstrate that the one-year  
22 limitation period on the claims for relief asserted in the  
23 instant motion commenced to run after May 27, 2004 and within the  
24 meaning of the accrual dates set forth above. Alternatively,  
25 petitioner must demonstrate by specific facts that he is entitled  
26 to equitable tolling of the one-year limitation period. In  
Calderon v. U.S. Dist. Court for Central Dist. of Cal., 128 F.3d  
1283 (9<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S.  
1061 (1998), overruled on other grounds, 163 F.3d 503 (9<sup>th</sup> Cir.  
1998), the Ninth Circuit held that the one-year limitations  
period applicable to Section 2255 motions is subject to equitable  
tolling. However, the Ninth Circuit further held:

1 Equitable tolling will not be available in  
2 most cases, as extensions of time will only  
3 be granted if 'extraordinary circumstances'  
4 beyond a petitioner's control make it  
5 impossible to file a petition on time ... We  
6 have no doubt that district judges will take  
7 seriously Congress's desire to accelerate the  
8 federal habeas process, and will only  
9 authorize extensions when this high hurdle is  
10 surmounted.

11 Id. at 1288-1289. In addition, petitioner is advised that the  
12 failure to assert all claims for relief in a recharacterized  
13 Section 2255 motion can result in the later preclusion such  
14 claims in a "second or successive" Section 2255 motion.

15 ACCORDINGLY:

16 1. Petitioner is hereby notified that the court finds that  
17 the instant motion should be recharacterized as a motion for  
18 relief pursuant to 28 U.S.C. § 2255. Petitioner may withdraw the  
19 motion if he does not wish to pursue relief under Section 2255.  
20 Should petitioner choose to withdraw the motion, he must file a  
21 notice of withdrawal of the motion within 30 days of the filing  
22 date of this order. If petitioner fails to file the notice of  
23 withdrawal within 30 days, the motion shall be adjudicated as a  
24 motion for relief under Section 2255.

25 2. If petitioner decides to proceed pursuant to Section  
26 2255, he must file an amended Section 2255 motion within 30 days  
of the filing date of this order setting forth all claims upon  
which he bases relief, the facts upon which he relies in  
contending that the claims in the Section 2255 motion are not  
time-barred and/or that petitioner is entitled to equitable

1 tolling. Failure to timely comply will result in the dismissal  
2 of the Section 2255 motion as time-barred.

3 IT IS SO ORDERED.

4 **Dated: August 15, 2005**  
668554

**/s/ Robert E. Coyle**  
UNITED STATES DISTRICT JUDGE